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No. 94-790

In the Supreme Court of the United States

OCTOBER TERM, 1994

JANET RENO, ATTORNEY GENERAL OF THE UNITED STATES, ET AL., PETITIONERS

v.

ZIYA K. KORAY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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1. Respondent concedes (Br. in Opp. 7-8) that the courts of appeals are divided on the question presented by the petition—whether a defendant may obtain credit under 18 U.S.C. 3585 toward his sentence of imprisonment for time when he was released on bail pursuant to the Bail Reform Act of 1984. Respondent contends, however, that the Third Circuit essentially adopted the Ninth Circuit's approach, so that "there is a two-way, not [a] three-way split in the circuits." Br. in Opp. 8. The short answer to that claim is that the Third Circuit itself disclaimed any intention to "go as far as does the Ninth Circuit" (Pet. App. 23a), believing instead that it was crafting an intermediate position between the view held by the seven circuits that have upheld the Bureau of

Prisons' interpretation of 18 U.S.C. 3585 and the Ninth Circuit's view to the contrary.

In any event, review by this Court is warranted even if the decision below could be read simply as taking the Ninth Circuit's side in "a two-way * * * split in the circuits." Br. in Opp. 8. The Third Circuit's decision to join the Ninth Circuit makes clear that the split in the circuits will not abate through the en banc process in the lower courts. For that reason, there is no force to respondent's reliance (*id.* at 9) on this Court's denial of certiorari in *Moreland* v. *United States*, 113 S. Ct. 675 (1992) (No. 92-458), a case that raised the same credit issue, but at a time when the Ninth Circuit was the only court of appeals that had rejected the Bureau of Prisons' view.

2. Respondent also suggests (Br. in Opp. 8-9) that review is not warranted, because the government did not believe that the credit issue was sufficiently important to seek en banc review in the Ninth Circuit. Respondent is wrong. The government sought en banc review when the Ninth Circuit first rejected the then-unanimous weight of authority governing the predecessor statute (18 U.S.C. 3568 (repealed)) in *Brown* v. *Rison*, 895 F.2d 533 (1990), and again when that court extended its holding to 18 U.S.C. 3585 in *Mills* v. *Taylor*, 967 F.2d 1397 (1992). The Ninth Circuit declined to grant en banc review in both cases. *Brown* v. *Rison*, No. 88-5535 (July 11, 1990); *Mills* v. *Taylor*, No. 91-55362 (Oct. 29, 1992). Within days of the Ninth Circuit's rejection of our en banc suggestion in *Mills*, we acquiesced in the petition for a writ of certiorari that was then pending in *Moreland*, noting the conflict created by the Ninth Circuit's decisions. See Brief for the United States in No. 92-458 (filed Nov. 13, 1992). In our view, the Third Circuit's

departure from the majority rule only increases the need for this Court's resolution of the issue.

There is no greater merit to respondent's related suggestion (Br. in Opp. 8) that the government has acquiesced in the Ninth Circuit's minority view by providing credit for restrictive conditions of bail to defendants sentenced in that circuit. The government has had no choice but to comply with binding Ninth Circuit precedent. That does not imply agreement with the conclusions reached by that court. See *United States* v. *Williams*, 112 S. Ct. 1735, 1740 (1992). Moreover, respondent's suggestion that the government similarly could "accommodate" the views of the Third Circuit (Br. in Opp. 8) overlooks the key issue: the Bureau of Prisons is charged with administering a national prison system, in which prisoners must be moved among penal facilities located in different circuits as needed to preserve security and population balance. As we have explained (Pet. 14-15 & n.7), that national system does not lend itself to the type of balkanization proposed by respondent.

3. Respondent contends (Br. in Opp. 17) that review is not warranted, because "[t]he type of restrictive * * * confinement at issue in this case" is of the government's "own making" and therefore the government "should solve it internally" rather than seeking review in this Court. Respondent appears to suggest that the credit issue presented in this case could be avoided if the government refrained from seeking restrictive conditions of bail. The determination of what conditions of bail are necessary to secure the presence of the defendant and the safety of the community, however, is committed to the courts, not to the government. See 18 U.S.C. 3142(c). And even if that were not so, respondent has not explained why the government should be required to elect

between enforcement of two applicable statutes—the Bail Reform Act of 1984 and Section 3585. That the government could solve the problem "internally" by abandoning its legal position is not a reason for denying plenary review.

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For the foregoing reasons and those set forth in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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